IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

WRIT PETITION NO.10124 OF 2004

Shri Babaso Mahadeo Patil Petitioner

Vs.

Sangli Zilla Prathamik Shikshak
Sahakari Bank Ltd. Respondent

Mr.A.V.Bukhari with Mr.B.V.Bukhari and Mr. S.S. Mutalik for petitioner.

Mr.S.S.Pakale for respondent.

CORAM: B.H.MARLAPALLE,J.
June 24, 2005.

ORAL ORDER:

1. Heard Mr.Bukhari with Mr.Mutalik, the learned counsel for the petitioner-employee and Mr.Pakale, the learned counsel for the respondent-employer-Bank. Being aggrieved by the judgment and order passed by the learned Member of the Industrial Court at Sangli on 28-9-2004 rejecting three complaints being Complaint (ULP) Nos. 21/98, 24/98 and 26/98 filed by the petitioner, on the preliminary point that he is not an "employee" within the meaning of Section 3(5) of the MRTU and PULP Act, 1971 (for short "the Act"), this petition has been filed. The first complaint was filed for the recovery of the subsistence

allowance, the second seeking to challenge the direction given by the Bank to compulsorily mark his attendance every day during the suspension period and the third complaint was filed for recovery of an amount of Rs. 19384/- towards the salary equivalent to the leave for the period from March 1997 to March 1998 along with interest at the rate of 18 % per annum.

2. As per Section 3(5) of the Act in relation to an industry to which the Bombay Act for the time being in force applies, the term "employee" means an employee as defined in clause (13) of Section 3 of the Bombay Industrial Relations Act, 1946 ("the BIR Act" for short). The said Section 3(13) reads as under:

> "(13) "employee" means any person employed to do any skilled or unskilled work for hire or reward in any industry, and included -
>
> (a) a person employed by a contractor to do any work for him in the execution of a contract with an employer within the meaning of sub-clause (e) of clause (14);
>
> (b) a person who has been, dismissed, discharged or retrenched or whose services have been terminated, from employment on account of any dispute relating to change in respect of which a notice is given or an application made under section 42 whether

before or after his dismissal, discharge, retrenchment or, as the case may be, termination from employment;

but does not include -

(i) a person employed primarily in managerial, administrative, supervisory or technical capacity drawing basic pay (excluding allowances) exceeding one thousand rupees per month;

(ii) any other person or class of persons employed in the same capacity as those specified in clause (i) above irrespective of the amount of the pay drawn by such persons which the State Government may, by notification in the Official Gazette, specify in this behalf."

3. The learned Member of the Industrial Court on assessment of the documentary and oral evidence as adduced before him by the respective parties has held that the petitioner was performing managerial functions primarily and, therefore, he could not lay a complaint of unfair labour practice under section 28(i) of the Act. Mr.Bukhari, the learned counsel for the petitioner has assailed this view on two grounds i.e. (a) the charge-sheet dated 30-3-1998 was issued by invoking the provisions of the Model Standing Orders and, therefore, the Bank is estopped from claiming that the petitioner is not an employee as defined under the BIR Act and (b) the Industrial Court committed errors apparent on the face of the

record in considering the evidence adduced by the respective parties. It is contended by the learned counsel for the petitioner that having regards to the evidence of the petitioner as well as the respondent-Bank it could not be said, by any stretch of imagination, that the petitioner was performing any duties or substantial portion of his duties so as to exclude him from the purview of the term "employee" as defined under Section 3(13) of the BIR Act. Mr.Bukhari, in support of his contentions, placed reliance on the following decisions of this Court:

. (i) S.A. Sarang v. W.G. Forge & Allied Industries Ltd. & ors. reported in **1995 I CLR 837**; (ii) Cricket Club of India & ors. v. Baljit Shyam (Mrs.) & ors. reported in **1998 I CLR 570**; (iii) Sunita B. Vatsaraj v. Karnataka Bank Ltd. & anr. reported in **1999 I CLR 1156** and (iv) Development Credit Bank Ltd. v. Azim A. Charanta reported in **2000 LAB.I.C. 2757**.

. Mr.Pakale, the learned counsel for the Bank on the other hand while supporting the view taken by the Industrial Court has placed reliance on the decisions

of this Court in the case of The Premier Automobiles Ltd. v. The Premier Automobiles Employees' Union reported in **1988 II CLR 257** and in the case of Shaukat Adam Malim v. Kokan Mercantile Co-operative Bank Ltd. & ors. reported in **2001 III CLR 632**.

4. The decisions in the cases of Premier Automobiles Ltd. (Supra) and Shaukat Adam Malim (Supra) reply the first challenge raised by Mr.Bukhari to the impugned decision of the Industrial Court. There is no doubt that the charge-sheet dated 30-3-1998 is concluded with the following words:

> "Above mentioned all misacts in the charges are committed by you while working at Ramanandnagar Branch of the Bank during period (1992 to 1997) and said misacts as per the Model Standing Orders applicable to Bank are of very serious nature misacts and you have committed the same."

5. There is no dispute that the petitioner was working as the Branch Manager at Ramanandnagar Branch from March 1990 onwards at least and he had under him three other employees. In the absence of prescribed Service Rules of the Supervisory / Managerial / Administrative Officers if the Bank invoked the Model Standing Orders for defining the misconduct alleged

against an employee in such a cadre that by itself would not bring him within the purview of the term "employee" as defined under the BIR Act. On the employer challenging the status of such a complainant on his approaching the Labour / Industrial Court, nature of his duties would be a very important consideration to decide his status as an "employee" within the meaning of the BIR Act. This Court in the case of Premier Automobile (Supra) in para 21 observed as under:

> "It is true that the chargesheet is on the basis that the standing orders apply to the second respondent. But what one has to examine in the present case is whether in fact the second respondent was discharging duties of a supervisory nature or not. Hence reference to standing orders in the chargesheet is not directly relevant in deciding this issue."

. In the case of Shaukat Adam Malim (Supra) this Court, after referring to the decisions in the Case of Premier Automobile Ltd. and Sarang's case (Supra) stated as under:

> "An isolated reference in a charge-sheet to the Model Standing Orders (as in the Premier Automobiles case) has thus to be distinguished from a continuous and consistent course of

> conduct by which the employer treated the employee as a workman under the relevant statutory provision. The rule is one of estoppel. Having continuously and consistently treated an employee as a workman, the employer cannot be permitted to question that status in industrial adjudication. An isolated or stray reference is not enough : a continuous and consistent course of conduct must exist..."

6. Before the Industrial Court the petitioner - complainant stepped in the witness box and on behalf of the respondent - Bank an employee under him viz. Rajubhai Moulali Shaikh was examined. The petitioner in his cross-examination explained the nature of his duties in the following words:

> "I was empowered to grant casual leaves and I have granted them accordingly. I have signed document produced with list Ex.C-10/1. I myself have prepared the same. The same pertains to distribution of work and respective employee including myself. It is mentioned in that duty list that a branch manager will control working of the Branch. It is not true that I was member of branch committee. I sent list of nominal members to H.O. It is not true that I used to recommend persons for enrolling them as nominal member. I have written confidential report of Bharat Mahadeo Kanase reg. his work. Copy of the same is with list Ex.C-9/J. I used to get balance sheet and profit and loss accounts prepared from the staff working under me."

. The learned Member by referring to the

contents of the booklet with the list of documents at Exhibit C-5/1 noted that the duties, responsibilities and powers of the Branch Manager are mentioned on page nos.6 to 11 of the said booklet. Some of these duties include acceptance of loan applications, scrutiny of the loan applications, recommendation to the Head Office, to keep in safe custody of the security of such loan and the control of the loan account, for proper functioning of the branch, sanction of loan within the limits allowed by the Board of Director or Managing Direction, execution of the necessary documents and to disburse the loans and to take steps for the recovery of loans, issuance of no objection certificate or no dues certificate as per the Rules of the Bank and so on and so forth.

. Mr.Rajubhai Moulali Shaikh, the witness of the Bank in his examination-in-chief stated that the petitioner worked as branch manager of Ramanandnagar Branch from 1989 to 1997. Casual leave of the staff used to be granted by the complainant whereas long leave used to be granted by the Head office on the recommendations of the complainant. In para 3 of his deposition he stated as under:

"3. The Complainant was authorised to sanction the loans and then to disburse the amount. Copies of some loan applications granted by him having his signatures are produced along with Exh. C-9/C (9 applications). The complainant used to arrange meeting of Branch Advisory Committee and then used to take decisions as resolved by the Committee,. Copy of resolution passed by the Committee is produced along with Exh.C-9/D. The complainant used to issue Balance Certificate under his signature. He also used to send requisition to Head Office for stationery and then used to distribute amongst the staff. The complainant used to relieve transferred employee as well as used to allow new employee to join. He also used to evaluate performance of staff working under him. He also used to write confidential reports of his subordinates. He further used to recommend about grant of permanency or otherwise of his subordinate. He also used to mark attendances and sign the muster roll. He further used to warn employees who were late. He used to recommend applications for nominal membership. All accounts were finalised by him under his signature. He alone used to distribute and supervise the work to his subordinates. He used to warn the subordinates and then used to report the head office, if there is no improvement. He used to be in custody of cash, documents, security etc. Decisions taken by him were binding on the Bank. Three persons were working under him at Ramanandnagar Branch."

. In the cross-examination it was also pointed out that the Advisory Committee for the Branch consisted of five members and the petitioner was one of them. The witness further admitted that the transfer orders were issued by the Head Office, the petitioner had no authority to serve chargesheet, the complainant did not issue written warnings to his

subordinate, he was not authorised to recruit employees and he had no authority to issue orders of permanency to the employees and in addition the petitioner was not allowed to take major policy decisions.

7. The evidence as adduced before the Industrial Court certainly went to prove that the petitioner was in-charge of the branch and he performed the managerial functions as far as the Ramanandnagar Branch was concerned. Certain corporate decisions were not within his purview like appointment of additional staff, confirmations of such staff, sanction of long leave and other major policy decisions which pertained to the policy of the bank as such. The findings of the Industrial Court have to be, therefore, read in the context of the responsibilities of the petitioner as a Branch Manager of the Ramanandnagar Branch and not the entire bank as such and if so viewed the Industrial Court was fully justified in holding that he was performing the managerial functions of the said branch. There was no other person who performed the said duties in respect of the Ramanandnagar branch. On the basis of the evidence placed before the

Industrial Court, the decisions relied upon by the learned counsel for the petitioner are not applicable and, therefore, there is no case made out to cause interference in the view taken by the Industrial Court by exercising the powers of superintendence under Article 227 of the Constitution.

8. In the Suspension Order dated 14/10/1997 issued against the petitioner it is stated that during the suspension period he will be given wages and allowance as per rules. The complaint filed by the petitioner was under Section 28(i) of the Act and unless he was able to prove that the complaint was maintainable the relief prayed for in the complaint could not be considered by the Industrial Court, even if for such a relief he was entitled to. In the case of Balvantrai Ratilal Patel v. State of Maharashtra reported in **AIR 1968 SC 800** a three-Judge Bench of the Apex Court had an occasion to consider the entitlement of an employee for subsistence allowance where there were rules prescribed under the Act i.e. to suspend and also to pay the subsistence allowance.

The ratio laid down by the Apex Court reads thus:

> "...It is now well settled that the power to suspend, in the sense of a right to forbid a

servant to work, is not an implied term in an ordinary contract between master and servant, and that such a power can only be the creature either of a statute governing the contract, or of an express term in the contract itself. Ordinarily, therefore, the absence of such power either as an express term in the contract or in the rules framed under some statute would mean that the master would have no power to suspend a workman and even if he does so in the sense that he forbids the employee to work, he will have to pay wages during the period of suspension. Where, however, there is power to suspend either in the contract of employment or in the statute or the rules framed thereunder, the order of suspension has the effect of temporarily suspending the relationship of master and servant with the consequence that the servant is not bound to render service and the master is not bound to pay. ... It is equally well settled that an order of interim suspension can be passed against the employee while an inquiry is pending into his conduct even though there is no such term in the contract of appointment or in the rules, but in such a case the employee would be entitled to his remuneration for the period of suspension if there is no statute or rule under which it could be withheld...."

9. The Industrial Court, and rightly so, has not dealt with the issue regarding the merit of the reliefs claimed by the petitioner in the three complaints filed by him as the Court was aware that such reliefs could be sought from another appropriate forum. A Division Bench of this Court in the case of Pralahad Vithal Rao Pawar v. Managing Director, Kannaded Sahakari Sakhar Karkhana Ltd. reported in **1998 II CLR 582** had an occasion to deal with such an

issue wherein it has been held that the supervisory / managerial category of employees working in an industry covered under the BIR Act have civil remedy including the relief under the Specific Relief Act, by filing a dispute under section 91 of the Maharashtra Co-operative Societies Act, 1960. The petitioner may resort to such a remedy, if so advised and the impugned decision of the Industrial Court in no way will operate as a bar in invoking such a remedy.

10. In the circumstances, there is no case made out to entertain this petition and the same is hereby rejected summarily.

(B.H.MARLAPALLE,J.)